NO. 91-1268

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OCTOBER TERM, 1991

SEWELL-ALLEN BIG STAR, INC.; BAKER BROS. INC., doing business as Baker's Big Star Stores Nos. 31, 61, 64, and 81; GILBERT ALLEN BIG STAR, INC., doing business as Big Star No. 142; SEWELL-ALLEN BIG STAR, INC., NOS. 103, 187, AND 189; SMF MANAGEMENT, INC., doing business as SMF Food Rite Supermarkets,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

UNITED FOOD AND COMMERCIAL WORKERS LOCAL 1529, AFL-CIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX VOLUME III

Decision of the National Labor Relations Board dated May 31, 1989 - pg. A-176

Order and Opinion of the Court of Appeals dated August 23, 1991 - pg. A-229

Order of the Court of Appeals denying rehearing dated November 1, 1991 - pg. A-243

David P. Jaqua
Kullman, Inman, Bee, Downing & Banta
5100 Poplar, Suite 1410
Memphis, TN 38137
Telephone: (901) 763-1771
Counsel of Record
for Petitioners

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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APPENDIX B

JD-(ATL)-38-84
Memphis, TN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
ATLANTA, GEORGIA

SEWELL-ALLEN BIG STAR, INC.

and

UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO, LOCAL NO. 1529

ET AL.

CASES 26-CA-9834
26-CA-9841
26-CA-9877
26-CA-9896
26-CA-9937-1,-2
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SJC

294 NLRB NO. 6

D—9580
Memphis, TN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL
LABOR RELATIONS BOARD

SEWELL-ALLEN BIG STAR, INC.[1] Case 26—CA—9834

BAKER BROS., INC., d/b/a BAKER'S BIG STAR STORES NOS. 31, 61, 64, AND 81 Case 26—CA—9841

GILBERT ALLEN BIG STAR, INC., d/b/a BIG STAR NO. 142; SEWELL-ALLEN BIG STAR, INC., 103, 187, AND 189; BAKER BROS., INC., d/b/a BAKER'S BIG STAR STORES NOS. 31, 61, 64, and 81 Case 26—CA—9896

SMF MANAGEMENT, INC., d/b/a SMF FOOD RITE SUPERMARKETS Case 26—CA—9989

and

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL—CIO, LOCAL 1529

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[1] On August 28, 1985, the Board granted a joint motion to sever filed by the respondents, Pic-Pac Foods, Inc. and Giant Foods, Inc., and the charging party, in Cases 26—CA—9937—1, 26—CA—9963—1, 26—CA—9937—2, and 26—CA—9963—2. Further, as noted by the Judge at fn. 2 of his decision, a complaint filed against an additional respondent, Wadell Bramlett and Lois Tackett d/b/a Bramlett Tackett Big Star No. 30 in Cases 26—CA—9896 and 26—CA—9877 was

DECISION AND ORDER

On May 4, 1984, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondents filed exceptions and supporting briefs, the General Counsel and the Charging Party filed cross-exceptions and supporting briefs, and the General Counsel, the Charging Party, and the Respondents filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[2] and

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Footnote 1 continued.

withdrawn and these cases were severed by order of the Regional Director for Region 26. Accordingly, we have deleted references to those cases in the caption, and we make no finding regarding these parties or enter any conclusions of law with respect to them.

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[2] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We correct the following factual errors of the judge. In sec. IV,A, of his decision, the judge refers to "a series of meetings to be held in February 1983." The correct date is February 1982. In sec. IV,B, the judge refers to letters of April 11, 1982, notifying the Respondents of the merger. The correct date is April 7, 1982. Throughout his decision, the judge refers to the expiration date of the collective-bargaining agreements as October 31, 1982. The correct date is October 30, 1982. In sec. IV,D,8, the judge refers to the testimony of William Garland regarding an incident in which his car tires allegedly were cut in 1981. The record reflects that the incident allegedly occurred in 1961. In sec. IV,D,5, the judge refers to testimony regarding $8 per month in

conclusions as modified below.[3]

1. For the reasons stated below, we adopt the judge's findings that the Respondents violated Section 8(a)(5) and (1) by withdrawing recognition and by refusing to bargain with the Union.

In January 1982,[4] representatives of United Food and Commercial Workers (UFCW) Locals 1529 and 452 agreed to a merger, with Local 1529 to become the surviving merged union.[5] In February, the merger was approved by the membership of Local 452. Nonmembers were excluded from the voting process. On April 1, International Union UFCW approved the merger.

On April 7, Local 1529 informed the Respondents, with whom Local 452 had maintained a collective-bargaining relationship, that Local 452 and Local 1529 "have effected a merger pursuant to the provisions of the [UFCW] Constitution" and that in accordance with a charter of April 1, 1982, Local 1529 "will continue to

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Footnote 2 continued.

contributions to a pension fund. The amount referred to in the record is $80 per month.

Under the circumstances presented in this case, we find it appropriate to substitute a narrow cease-and-desist order for the broad order recommended by the judge.

[3] On October 8, 1986, the Board granted the Charging Party's motion to withdraw allegations pertaining to the handbilling and access issues discussed at secs. IV,F,14, and IV,H, of the judge's decision. On October 22, 1986, the Board denied the Respondent's motion for reconsideration. We make no findings regarding the judge's discussion of these issues and we have modified the judge's recommended conclusions of law.

[4] All dates are in 1982 unless noted otherwise.

[5] In *Warehouse Groceries Management*, 254 NLRB 252, 256 (1981), enfd. 683 F.2d 418 (11th Cir. 1982), the Board found that UFCW was a continuation of Retail Clerks International Association and Amalgamated Meat Cutters and Butcher Workers of North America and that it succeeded to the representational rights of both unions.

administer the contract and in all respects continue as the collective bargaining representative of the employees covered by the contract." Local 1529 informed the Respondents that the merger was conducted pursuant to a vote of the membership, and that it did not affect the autonomy of the local and was solely an internal union matter. Also attached to the April 7 letter was a notice to the Respondents that all future correspondence concerning dues checkoff and/or money was to be mailed to Local 1529. In May, the Respondents, Sewell's Big Star, Sewell-Allen No. 2, Sewell-Allen, and Baker's Big Star (Baker Bros.), in response to union correspondence, indicated to Local 1529 that "your letter reconfirms the company's information that Meatcutters Local 452 has merged into Local 1529."

Following notification of the merger in April, the Respondents dealt with Local 1529 as the collective-bargaining representative of the employees covered by their respective bargaining agreements. Thus, as the judge found, grievances were processed, health and welfare and pension fund contributions were remitted, dues were deducted and remitted pursuant to contractual checkoff provisions, when present, and some of the Respondents engaged in bargaining with Local 1529 concerning insurance contribution increases that were due in June.

On July 30, Local 1529 requested that the Respondents commence bargaining for agreements to succeed those expiring on October 30, and requested information pertinent to bargaining. In September, several of the Respondents provided portions of the requested information. Thereafter, on October 7 and 13, initial bargaining sessions were conducted between the Respondents and Local 1529. However, on November 8, following expiration of the bargaining agreements, and 7 months after notification of the merger, the Respondents notified Local 1529 that they no longer recognized Local 1529 as the bargaining representative of their employees. The Respondents asserted that the merger between Local 452 and Local 1529

was invalid because nonmembers had been excluded from the voting process.[6]

We agree with the judge that, based on the foregoing circumstances, the Respondents were estopped from challenging the validity of the merger. It is uncontroverted that, in April, the Respondents expressly were notified of the merger and of Local 1529's assertion of representative status. In response, the Respondents continued to deal with Local 1529 over a 7-month period in the identical manner with which they had dealt with Local 452—processing grievances, remitting dues, tendering health and welfare and pension contributions, and negotiating midterm changes in insurance contributions. This entire course of conduct constituted an acceptance of the representative status of Local 1529. Further, Local 1529 relied to its detriment on the Respondents' recognition of its status as bargaining representative because it took no action to reestablish its status during the 7-month period between the notice of the merger and the Respondents' withdrawal of recognition. Accordingly, we find that the Respondents are estopped from contesting the validity of the merger process as a defense to the 8(a)(5) and (1) allegations.[7] *El Torito-La Fiesta Restaurants*, 284 NLRB No. 66 at slip op. 6—7 (June 26, 1987), enfd. mem. in relevant part 852 F.2d 571 (9th Cir. 1988); *Ventura County Star-Free Press*, 279 NLRB 412, 419 (1986); *Knapp-Sherrill Co.*, 263 NLRB 396, 398 (1982), and 268 NLRB 800, 801 fn. 3 (1984).

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[6] At the hearing, the Respondents raised, in addition to the exclusion of nonmembers, other alleged infirmities in the merger process.

[7] We note that, in any event, the Respondents' reliance on Local 1529's failure to permit nonmembers to vote in the merger process, as a justification for their withdrawal of recognition, lacks merit in light of *NLRB v. Food & Commercial Workers Local 1182 (Seattle-First National)*, 475 U.S. 192 (1986), in which the Supreme Court held that nonmember employees need not be afforded the opportunity to vote on their bargaining representative's decision to affiliate with another union.

Further, we agree with the Judge that permitting the Respondents to challenge the majority status of Local 1529 more than 6 months after they had effectively accepted Local 1529 as the proper successor to the representational rights of Local 452 is inconsistent with the policies underlying Section 10(b) of the Act as set forth in *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411 (1960). In *Bryan Mfg.*, the Supreme Court held that the act of entering into a collective-bargaining agreement at a time when the union did not represent a majority of the unit employees could not be challenged as an unfair labor practice on the part of either the union or the employer if the charge were filed more than 6 months after the contract was executed. That same principle should logically apply to any unfair labor practice charge predicated on the unlawful recognition of a union, during the term of a collective-bargaining agreement, where the union was neither essentially the same entity that had negotiated the agreement nor the properly designated majority representative.[8] And just as the policies underlying Section 10(b) would preclude a direct attack, under Section 8(a)(2) and (3) or Section 8(b)(1)(A) and (2), against acceptance of recognition

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[8] An employer normally is not free, during the term of a collective-bargaining agreement, to withdraw recognition from the union with which it negotiated the agreement. *Abbey Medical/Abbey Rents*, 264 NLRB 969 (1982), enfd. 709 F.2d 1517 (9th Cir. 1983). An excception to this rule is made when a union that negotiated the contract has become defunct or when certain forms of union schism occur. See *Yates Industries*, 264 NLRB 1237, 1249 (1982), and cases there cited. Thus, in the present case, the Respondents would have been entirely within their rights to refuse to deal with a union under the collective-bargaining agreement if they had determined that Local 452 no longer existed under its own name and that Local 1529 had not become a successor pursuant to a valid merger. Indeed, if those were the facts, it would have constituted a violation of Sec. 8(a)(2) for the Respondents to recognize Local 1529 if they had no basis for believing that it had obtained majority support within the bargaining unit. As noted above, however, the Respondents recognized Local 1529 as the successor under the agreement, thereby indicating an acceptance of Local 1529's claim to recognition.

demands by a union asserting that it was a proper successor to the contracting union, so those policies are offended by an indirect attack on the validity of the merger process through a defense to a later withdrawal of recognition. It is undisputed that the Respondents were notified of the merger in April and that they did not contest its validity until November 8, 7 months after notification. Under the principles set out above, we find that the Respondents' challenge came too late and therefore cannot be considered as a defense to the 8(a)(5) charge in the present proceeding. See *Joe Costa Trucking*, 238 NLRB 1516, 1517 (1978), enfd. 631 F.2d 604 (9th Cir. 1980); *North Bros. Ford*, 220 NLRB 1021 (1975).[9]

2. We adopt the judge's findings that Respondent Sewell-Allen Big Star, Inc., No. 2, d/b/a Big Star No. 103 (the Respondent) violated Section 8(a)(3) and (1) by discharging employees Bill Gross, Theresa Heist, Becky Hordyk, and James Kimbrough and by demoting employee Johnnie Worrell.

Employees Heist and Hordyk worked as part-time meatwrappers and Gross worked as a part-time meat cutter. As described more fully by the judge, commencing in June 1982, the Respondent, through Owners Lex Sewell and Dan Allen, Store Manager Michael Gordon, and Supervisor Clifford Phillips, engaged in a series of acts violative of Section 8(a)(1), including repeated attempts to solicit employee abandonment of the Union, threats of reprisal for exercising Section 7 rights, promises of benefit, expressions that continued support of the Union would be futile, and coercive interrogations. This course of conduct seeking to oust the Union as bargaining representative included the recruitment by Gordon and Phillips of employee Leroy Dancer to solicit employee signatures on a petition

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[9] Because we find that the Respondents are barred from contesting the validity of the merger process, we find it unnecessary to consider the propriety of the merger process itself.

repudiating the Union. As an initial inducement, Phillips offered to arrange additional hours of work for Dancer, who, at the time, worked less than a full-time schedule. Thereafter, Gordon showed Dancer a petition Gordon had prepared reading, "[W]e do not want Local 1529 or Local 452 to represent us. We want out." Gordon asked Dancer to circulate the petition and obtain signatures.

On August 25, the Respondent placed Phillips in a bargaining unit position as head meatcutter, resulting in the demotion of employee Worrell from head meatcutter to journeyman meatcutter. That week, Heist, Hordyk, and Gross were discharged. When Dancer expressed doubts to Gordon about whether a majority of employees would sign the petition, Gordon showed Dancer the new work schedule, resulting from the discharges, and said, "[W]ell, I want to show you something—It is even now. These people are no longer with us." Gordon then mentioned Heist, Hordyk, and Gross and told Dancer they had been terminated. Further, with the placement of Phillips in a unit position, Dancer sought the signature of Phillips on the petition, as instructed by Gordon. After Dancer filed the decertification petition with the Board, Gordon complimented him on a job "well done" and rewarded him with the additional hours of work formerly worked by discharged meatcutter Gross.

During the course of the Respondent's efforts to enlist employee support to repudiate the Union, Sewell and Allen held a meeting of meat department employees. They indicated to employees that it was time to decertify the Union, interrogated employees as to whether they were willing to repudiate the Union, expressed an unwillingness to negotiate with the Union, and promised improved benefits without the Union. At this meeting, the Respondent directed certain comments directly to employee Kimbrough. When Sewell asked employees whether they would repudiate the Union, Kimbrough stated openly that he would stay in the Union. Sewell responded by stating "that

means whether you will have a job or not" and "you better think about your wife and children." Sewell also told Kimbrough, "I hate to see you walking the street, come December or January." On January 8, 1983, the Respondent laid off Kimbrough.

The Respondent contends that the discharges of Heist, Hordyk, Gross, and Kimbrough and the demotion of Worrell were attributable solely to economic reasons. It contends that the meat department was overstaffed, that the layoffs of these employees were a continuation of earlier layoffs, that productivity was increased, and that the layoff of Gross was designed to "placate" the Union by permitting it to staff the meat department on the night shift.

Contrary to the contentions of the Respondent, we agree with the judge that the real reason for the discharges, and the demotion of Worrell, was the participation of these employees in union activities, and that the Respondent's stated business justifications do not withstand scrutiny. First, the credited testimony of Dancer establishes that the Respondent was acutely aware that the termination of Heist, Hordyk, and Gross meant that the tally of union supporters and nonsupporters was, in the words of Gordon, "even now" with the termination of these employees. Further, the demotion of Worrell resulted directly from the placement of Clifford Phillips into a unit position, for the express purpose of making Phillips eligible to sign the petition repudiating the Union. Thus, the record shows that the personnel changes in the department were an attempt to alter the ratio of union supporters in comparison to nonsupporters. Additionally, the discharge of Kimbrough followed closely the repeated threats of discharge, directed to Kimbrough, in response to his outspoken union sentiments. Bluntly, the Respondent informed Kimbrough that his views regarding retention of the Union would determine "whether you will have a job or not."

Regarding the Respondent's economic defense, we note that the record does not support the Respondent's contentions that, as part of a plan to reduce manpower, it laid off two employees prior to the discharge of Heist and Hordyk. One of these employees (Gloria Greech) left of her own volition and the other (Chris Phillips) was laid off after Heist and Hordyk. Further, because the record establishes that the Respondent, as a matater of policy, routinely denied the Union's grievances during the time of these alleged unfair labor practices, its assertion that its layoff of Gross was designed to "placate" the Union, in response to a grievance, is unconvincing.

In addition, although the the record shows that the amount of sales in the meat department remained relatively stable and did not decline following the terminations and the consequent reduction in employee hours worked, it does not follow that the terminations would have occurred even absent the employees' union sentiments. The Respondent's proffered defense essentially rests on the notion that because sales did not decline following the elimination of the hours formerly worked by the terminated employees, it has established that the terminations were economically motivated, i.e., part of an effort to do the same work with fewer, more productive employees. We do not agree. This is not a case where a demonstrable decline in sales leads to a reduction in personnel. Here, sales had remained stable at all pertinent times and staffing was maintained for months at the same levels, until the Respondent decided to seek the repudiation of the Union and terminated union adherents, transferring some of the hours they formerly worked to other employees, including the employee enlisted to circulate a decertification petition. In these circumstances, we agree with the judge that the discharges of Heist, Hordyk, Gross, and Kimbrough, and the demotion of Worrell, violated Section 8(a)(3) and (1).

3. We adopt the judge's findings that Respondent

Baker Bros. violated Section 8(a)(1) of the Act by interrogating and threatening employees, promising them benefits if they repudiated the Union,[10] soliciting employees to abandon the Union, and sponsoring the circulation of decertification petitions. As to those acts committed by head meatcutters Hamm, Todd McClellan, and Westmoreland, each of whom, we agree with the judge, was a supervisor within the meaning of Section 2(11) of the Act,[11] Respondent Baker Bros. contends that the conduct is not attributable to it because these individuals were members of the bargaining unit. We disagree.

The Board has long held that conduct engaged in by supervisors who are included in the bargaining unit is attributable to the employer only when there is evidence that the employer encouraged, authorized, or ratified the supervisor's activity or acted in such a manner as to lead employees reasonably to believe that the supervisors were acting for and on behalf of management. *Montgomery Ward & Co.*, 115 NLRB 645 (1956), enfd. 242 F.2d 497 (2d Cir. 1957), cert. denied 355 U.S. 829 (1957). Here, even assuming that Hamm, Todd McClellan, and Westmoreland are members of the bargaining unit, the record demonstrates that the Respondent, by virtue of conduct by its owner and president, Al Baker, led employees reasonably to believe that Hamm, Todd McClellan, and Westmoreland were acting for and on behalf of management.

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[10] In finding that Al Baker promised employees improved working conditions in violation of Sec. 8(a(1), if they decertified the Union, we do not rely on Baker's comments that employees would not lose any benefits. Rather, we agree with the judge that, in context with his remarks reregarding the decertification effort, Baker's assurance that the Company would operate a lot smoother without the Union was an implied promise of improved working conditions.

[11] As the allegedly unlawful conduct attributable to Mark McClellan is cummulative to the violations found, we find it unnecessary to decide whether Mark McClellan's conduct was attributable to the Respondent.

As the judge found, the three supervisors made numerous statements in connection with the circulation of a decertification petition that were coercive and that, in part, expressed to employees the likely management response to continued union representation. Thus, they told employees, among other things, that Al Baker was not going to sign another union contract, that management would not even negotiate with the Union, that management would reward employees with better wages and benefits if they ousted the Union, and that if employees supported the Union, they would lose their jobs.

Following the solicitation of employees to sign the petition and the accompanying coercive statements, Todd McClellan informed Al Baker of the result of the solicitations. According to Baker, prior to his receipt of formal notification from the Board that a petition had been filed, McClellan told him that "virtually all of our employees" had signed the petition, with one or two exceptions.

Thereafter, Al Baker spoke to the employees at the Respondent's stores. He told the employees that he appreciated their standing up for the Company and for signing the petition, and stated that as soon as he could get rid of all the "interruptions, " the Company would operate a lot smoother. In the presence of Todd McClellan, Baker also told the employees that he understood that an "overwhelming majority" had signed the petition.

In these circumstances, we find that Al Baker led employees reasonably to believe that Hamm, Todd McClellan, and Westmoreland were acting for and on behalf of management. The three supervisors represented to employees during the decertification effort that management would reward employees for ousting the Union, that Al Baker would not sign a contract or even negotiate with the Union, and that the employees could lose their jobs if they supported the Union. When Baker informed the employees, in the presence of Todd McClellan, that he was

aware that most of them signed the petition, he could reasonably be understood to be privy to an essential detail of the petition's circulation.

By virtue of his conduct at these meetings, urging ouster of the Union, emphasizing the result to be achieved by doing so, and revealing details of the circulation of the petition, Al Baker furthered the reasonable perception that Hamm, Todd McClellan, and Westmoreland were acting for and on behalf of management when they circulated the petition seeking ouster of the Union, solicited signatures, and made repeated coercive statements to the employees concerning the likely favorable management reaction. We therefore, on this basis, adopt the judge's findings that Respondent Baker Bros. violated Section 8(a)(1).[12]

Conclusions of Law

1. Respondents Sewell's Big Star, Inc.; Sewell-Allen Big Star, Inc.; Sewell-Allen Big Star, Inc. No. 2; Baker Bros., Inc.; SMF Management, Inc., d/b/a SMF Food Rite Supermarkets; and Gilbert Allen Big Star, Inc., d/b/a Big Star No. 142, are each employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food and Commercial Workers International Union, AFL—CIO, Local 1529 is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent Sewell's Big Star, Inc., d/b/a Sewell's Big Star No. 187 constitute a unit appropriate for collective bargaining within the meaning of Section 9 of the Act:

> All head meat cutters, journeymen meat cutters, apprentices and wrapper-clerks.

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[12] For the reasons discussed in sec. 1, above, we also adopt the judge's 8(a)(5) and (1) findings as to Respondent Baker Bros.' withdrawal of recognition of the Union, as well as the judge's remaining 8(a)(5) and (1) findings.

4. The following employees of Respondent Sewell-Allen Big Star, Inc., d/b/a Sewell-Allen Big Star No. 189 constitute a unit appropriate for collective bargaining within the meaning of Section 9 of the Act:

> All head meat cutters, journeymen meat cutters, apprentices and wrapper-clerks.

5. The following employees of Respondent Sewell-Allen Big Star, Inc., No. 2 d/b/a Sewell-Allen's Big Star No. 103 constitute a unit appropriate for collective bargaining within the meaning of Section 9 of the Act.

> All head meat cutters, journeymen meat cutters, apprentices and wrapper-clerks.

6. The following employees of Respondent Baker Bros., Inc., d/b/a Baker's Big Star Stores Nos. 31, 61, 64, and 81 constitute a unit appropriate for collective bargaining within the meaning of Section 9 of the Act.

> All head meat cutters, journeymen meat cutters, apprentices and wrapper-clerks.

7. The following employees of Respondent SMF Management, Inc., d/b/a SMF Food Rite Supermarkets constitute a unit appropriate for collective bargaining within the meaning of Section 9 of the Act:

> All head meat cutters, journeymen meat cutters, apprentices and wrappers.

8. The following employees of Respondent Gilbert Allen Big Star, Inc., d/b/a Big Star No. 142 constitute a unit appropriate for collective bargaining within the meaning of Section 9 of the Act:

> All head meat cutters, journeymen meat cutters, apprentices and wrapper-clerks.

9. Each of the Respondents had knowledge of the merger in April 1982 of United Food and Commercial Workers Locals 1529 and 452 and recognized Local 1529 as the successor of Local 452 and continued to do so until after the expiration of their collective-bargaining agreement(s) with Local 452 on October 30, 1982.

10. About November 8, 1982, Respondents Sewell's Big Star, Inc.; Sewell-Allen Big Star, Inc.; Sewell-Allen Big Star, Inc. No. 2; Baker Bros., Inc.; SMF Management, Inc., d/b/a SMF Food Rite Supermarkets; and Gilbert Allen Big Star, Inc., d/b/a Big Star No. 142, each withdrew recognition from and refused to bargain with Local 1529 as the collective-bargaining representative of their employees in the above appropriate units.

11. As a result of their voluntary recognition of Local 1529 as the successor to Local 452 as the collective-bargaining representative of their employees and their failure to withdraw recognition from the Union until more than 6 months after they voluntarily recognized Local 1529 in April 1982, each of the Respondents is barred by Section 10(b) of the Act from challenging the representative status of Local 1529 as a defense to the unfair labor practice charges alleging that they unlawfully withdrew recognition from Local 1529.

12. By reason of their delay in withdrawing recognition from Local 1529 until after the expiration of their collective-bargaining agreements with Local 452, each of the Respondents is estopped from withdrawing recognition from Local 1529 by challenging the validity of the merger.

13. Respondents Sewell-Allen Big Star, Inc., d/b/a Big Star No. 189 and Sewell-Allen Big Star, Inc. No. 2, d/b/a Big Star No. 103 are a single employer.

14. By their withdrawal of recognition in November 1982 and continuing refusal to bargain with Local 1529 as

the collective-bargaining representative of their employees in the appropriate units found above, and to furnish information to the Union for bargaining, Respondents Sewell's Big Star, Inc.; Sewell-Allen Big Star, Inc.; Sewell-Allen Big Star, Inc., No. 2; Baker Bros., Inc.; SMF Management, Inc.; and Gilbert Allen Big Star, Inc., d/b/a Big Star No. 142 violated Section 8(a)(5) and (1) of the Act.

15. By its June 28, 1982 solicitation of its employee Johnnie Worrell to withdraw as a member of Local 1529 and its promise of improvements in working conditions if he did so, Respondent Sewell-Allen Big Star, Inc., No. 2 violated Section 8(a)(1) of the Act.

16. By its June 30, 1982 solicitation of its employee Worrell to withdraw from the Union; by its promise of improvements in benefits if he did so; and by its issuance of a threat of store closure if the employees did not abandon the Union, Respondent Sewell-Allen Big Star, Inc., No. 2 violated Section 8(a)(1) of the Act.

17. By its July 12, 1982 solicitation of employee Worrell to withdraw from the Union, and by its issuance of an unspecified threat to Worrell regarding his future; by its statement that it would be unable to bargain with Union President Sheppard; by its threat of plant closure if Worrell and the other employees remained in the Union, and by its promises of improvements in wages and benefits if the employees abandoned the Union, Respondent Sewell-Allen Big Star, Inc., No. 2 violated Section 8(a)(1) of the Act.

18. By its July 26, 1982 interrogation of employee Worrell concerning whether he had decided to withdraw from the Union; by its threat of the futility of continued representation by the Union; and by its implied promise of improvements in benefits and other terms and conditions of employment if its employees withdrew from the Union, Respondent Sewell-Allen Big Star, Inc., No. 2 violated Section 8(a)(1) of the Act.

19. By its late July 1982 solicitation of employees Thomas Shelton Jr. and Michael Rowley to withdraw from the Union; its promise of improvements in their retirement and insurance benefits if they did so; and its threat of less desirable working hours and loss of employment if they did not withdraw from the Union, Respondent Sewell-Allen Big Star, Inc., No. 2 violated Section 8(a(1) of the Act.

20. By its early August 1982 solicitation of its employees Herbert Bobbitt, James Kimbrough, and Worrell to withdraw from the Union; by its threat of the futility of continued union representation because it would not allow Union President Sheppard in its store; and by its promise of improvements in wages and benefits if the employees withdrew from the Union, Respondent Sewell-Allen Big Star, Inc., No. 2 violated Section 8(a)(1) of the Act.

21. By its mid-August 1982 interrogation of its employees Worrell, Kimbrough, Shelton, Rowley, and Mary Armour concerning their support of the Union; by its solicitation of its employees to withdraw from the Union; by its representation to the employees that it would not bargain with or sign a labor agreement with Union President Sheppard, demonstrating the futility of the employees' continued support of the Union; by its promises of improvements in pension benefits if the employees withdrew from the Union; and by its threat of discharge to employee Kimbrough if he did not withdraw from the Union, Respondent Sewell-Allen Big Star, Inc., No. 2 violated Section 8(a)(1) of the Act.

22. By its solicitation of its employee, William Garland, in August 1982 to withdraw from the Union and that Garland solicit the withdrawal of its other employees from the Union; by its promise of improvements in benefits if the employees withdrew from the Union; by its subsequent mid-August 1982 interrogation of its employees

Garland, Bobby Thurman, and Jim Perry concerning their sentiments with respect to the circulation of the decertification petition; by its solicitation of said employees to withdraw from the Union; by its promise of improvements in wages and benefits if they withdrew from the Union; by its statement that it would not negotiate with or sign a labor agreement with Union President Sheppard and the Union; and by its threat of a strike by the Union, Respondent Sewell-Allen Big Star, Inc., No. 2 violated Section 8(a)(1) of the Act.

23. By its solicitation of employee Mary Fortner in late August 1982 to bypass her collective-bargaining representative and to bring grievances to the attention of its management, Respondent Sewell-Allen Big Star, Inc., No. 2 violated Section 8(a)(1) of the Act.

24. By its solicitation of its employee Leroy Dancer to withdraw from the Union; by its promise to give him additional working hours if he did so; and by its solicitation and sponsorship of the filing of the decertification petition by Dancer, Respondent Sewell-Allen Big Star, Inc., No. 2 violated Section 8(a)(1) of the Act.

25. By the discharge of its part-time employees Bill Gross, Theresa Heist, and Becky Hordyk; and by its demotion of head meatcutter Johnnie Worrell to journeyman meatcutter in August 1982, Respondent Sewell-Allen Big Star, Inc., No. 2 violated Section 8(a)(3) and (1) of the Act.

26. By its discharge of employee James Kimbrough, Respondent Sewell-Allen Big Star, Inc., No. 2 violated Section 8(a)(3) and (1) of the Act.

27. By their implementation of unilateral changes in the terms and conditions of employment of their employees following the withdrawal of recognition from Local 1529 by the unilateral granting of wage increases to their employees; by refusing to accept or process grievances filed

by the Union; and by refusing to furnish information to the Union, Respondents Sewell's Big Star, Inc.; Sewell-Allen Big Star, Inc.; and Sewell-Allen Big Star, Inc., No. 2 violated Section 8(a)(1) and (5) of the Act.

28. By their unlawful course of conduct initiated in the summer of 1982 and continuing thereafter, whereby Respondent Sewell-Allen Big Star, Inc. engaged in violations of Section 8(a)(1) and (5) of the Act and Respondent Sewell-Allen Big Star, Inc., No. 2 engaged in violations of Section 8(a)(1), (3), and (5) of the Act, each of the Respondents has engaged in an unlawful course of conduct inconsistent with its obligation to bargain with Local 1529 as the collective-bargaining representative of its employees, and has thereby committed a separate violation of Section 8(a)(5) and (1) of the Act.

29. By its interrogation of its employee William Mayfield in June 1982 concerning whether he was a member of the Union, Respondent Baker Bros., Inc. violated section 8(a)(1) of the Act.

30. By its solicitation of its employee Mayfield in August 1982 to sign a petition to decertify the Union; by its promise to Mayfield of improvements in wages and benefits if the Union were decertified; by its threat of a harmful strike if a decertification petition was delayed; and by its threat that it would not sign another contract with the Union, Respondent Baker Bros., Inc. violated Section 8(a)(1) of the Act.

31. By its solicitation of its employee Roy Needham to sign a petition to decertify the Union; and by its threat of discharge issued to Needham if he engaged in a strike, Respondent Baker Bros., Inc. violated Section 8(a)(1) of the Act.

32. By its solicitation of employees Richard Floyd and Mary Jane Monasco to sign a petition to decertify the

Union; by its promise of improved working conditions if the employees abandoned the Union; and by its statement that it would no longer honor the labor agreement with the Union, Respondent Baker Bros., Inc. violated Section 8(a)(1) of theAct.

33. By its solicitation of its employees Vickie Mason and Patricia Doty to sign the decertification petition; and by its statement to these employees that a new labor agreement would not be signed with the Union, Respondent Baker Bros., Inc. violated Section 8(a)(1) of the Act.

34. By its solicitation of its employee Randy Inman to sign the decertification petition; and by its statement to Inman that it would be a nonunion company and that the Union was out, Respondent Baker Bros., Inc. violated Section 8(a)(1) of the Act.

35. By its solicitation of its employee Robert Travis to sign a decertification petition; by indicating that continued support for the Union would be futile as it would not negotiate with the Union; and by its implied promise of a wage increase if the employees chose to decertify the Union, Respondent Baker Bros., Inc. violated Section 8(a)(1) of the Act.

36. By its interrogation of employee Mayfield on August 5, 1982, as to whether he had attended a union meeting; by its threat to Mayfield that if he voted for the Union, he would either lose his job or have his working hours reduced; and by its promise of job security if Mayfield voted to decertify the Union, Respondent Baker Bros., Inc. violated Section 8(a)(1) of the Act.

37. By its interrogation of employee Mayfield concerning his union activities; and its solicitation of Mayfield to bypass his bargaining representative and notify management of contacts by the Union, Respondent Baker Bros., Inc. violated Section 8(a)(1) of the Act.

38. By the statements of its president, Al Baker, to the employees of Baker Big Star No. 81 in August 1982, that the Company would run smoother as soon as he could get rid of the interruptions (the Union), Respondent Baker Bros., Inc. violated Section 8(a)(1) of the Act.

39. By its solicitation of employees Monasco and Floyd to sign a second decertification petition, Respondent Baker Bros., Inc. violated Section 8(a)(1) of the Act.

40. By its sponsorship and circulation of two petitions to decertify the Union, Respondent Baker Bros., Inc. violated Section 8(a)(1) of the Act.

41. By its implementation of unilateral changes in the terms and conditions of employment of its employees following the withdrawal of recognition from Local 1529 by the unilateral granting of wage increases; by refusing to accept or process grievances filed by the union; by deducting union dues from its employees and failing to remit them to the Union; and by refusing information to the Union, Respondent Baker Bros., Inc. violated Section 8(a)(5) and (1) of the Act.

42. By its unlawful course of conduct in its attempt to rid itself of the Union, which was inconsistent with its obligation to bargain with the Union, Respondent Baker Bros., Inc. violated Section 8(a)(5) and (1) of the Act.

43. By its implementation of unilateral changes in the terms and conditions of employment of its employees following its withdrawal of recognition from the Union by the granting of wage increases and by refusing to furnish information to the Union, Respondent Gilbert Allen Big Star, Inc., d/b/a Big Star No. 142 violated Section 8(a)(5) and (1) of the Act.

44. By its implementation of unilateral changes in the terms and conditions of employment of its employees

following the withdrawal of recognition from the Union by the granting of wage increases; by its refusal to furnish information to the Union; and by its refusal to process grievances, Respondent SMF Management, Inc. violated Section 8(a)(5) and (1) of the Act.

45. The above unfair labor practices have an effect on commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

In accordance with our findings that the Respondents unlawfully withdrew recognition from Local 1529 following the expiration of their collective-bargaining agreements with Local 452, we shall order the Respondents to rescind their withdrawal of recognition, and make any and all payments that have otherwise been due under the terms of their expired labor agreements, including the payments of union dues to the Union that were unlawfully withheld by certain Respondents. The Board does not require that employees suffer the loss of increases in wages and improvements in benefits which, as here, employers have unlawfully, unilaterally implemented. Accordingly, we shall not require that the increases in wages and improvements or increases in benefits or implementation of new benefits by the Respondents after their withdrawal of recognition be rescinded. *Kendall College*, 228 NLRB 1083 (1977), enfd. 570 F.2d 216 (7th Cir. 1978); *Dura-Vent Corp.*, 257 NLRB 430 (1981); and *Pace Oldsmobile*, 256 NLRB 1001 (1981), enfd. in relevant part 681 F.2d 99 (2d Cir. 1982). All other terms and conditions of the Respondents' bargaining agreements that expired on October 30, 1982, shall be reinstated to the status quo ante until the

Respondents fulfill their obligations by bargaining, on request, with the Union as the collective-bargaining representative of their employees in the appropriate units, and either reach and execute written agreements with the Union or until valid impasses occur. We shall order that the Respondents furnish the information requested by the Union necessary for it to bargain, on request by the Union, within a reasonable period after the request.

We further order that Respondent Sewell-Allen Big Star, Inc., No. 2 rescind the discharge of employees Bill Gross, Theresa Heist, Becky Hordyk, and James Kimbrough and the demotion of employee Johnnie Worrell, and that the Respondent remove from its personnel records all references thereto and make the above-named employees whole with respect to any loss of seniority, earnings, and benefits that they may have incurred but for the Respondent's unlawful actions against them.

All backpay for loss of earnings and benefits suffered by any employees of the Respondents by reason of the Respondents' withdrawal of recognition from the Union and refusal to bargain with the Union, and losses by the Union and/or employees by reason of the Respondents' refusal to remit union dues, as found above, shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682, 683 (1970). Backpay for any loss of earnings and benefits suffered by employees Gross, Heist, Hordyk, Kimbrough, and Worrell by reason of the discrimination practiced against them by Respondent Sewell-Allen Big Star, Inc., No. 2 shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Interest in all instances shall be computed in the manner prescribed in *New Horizons for the Retarded*.[13]

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[13] 283 NLRB No. 181 (May 28, 1987). Interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1988 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date

ORDER

The National Labor Relations Board orders that the Respondents, Sewell's Big Star, Inc.; Sewell-Allen Big Star, Inc.; Sewell-Allen Big Star, Inc., No. 2; Baker Bros., Inc., d/b/a Baker's Big Star Stores Nos. 31, 61, 64, and 81; SMF Management, Inc., d/b/a SMF Food Rite Supermarkets; and Gilbert Allen Big Star, Inc., d/b/a Big Star No. 142, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition from and refusing to bargain in good faith with United Food and Commercial Workers International Union, AFL-CIO, Local No. 1529.

(b) Failing and refusing to abide by the terms of their expired labor agreements with the Union, until such time as agreements are reached with the Union or impasse is reached.

(c) Failing and refusing to meet and bargain in good faith with the Union.

(d) Instituting changes in the terms of the collective-bargaining agreement that expired on October 30, 1982, or in any other terms and conditions of employment of the employees without bargaining with the Union.

(e) Failing and refusing to furnish the Union with relevant information necessary for it to bargain on behalf of its members.

(f) Unilaterally granting employees wage increases.

Footnote 13 continued.

of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

(g) Respondent SMF Management, Inc. shall further cease and desist from refusing to process grievances.

(h) Respondent Baker Bros., Inc. shall further cease and desist from interrogating its employees concerning their union sympathies; soliciting the withdrawal of its employees from the Union; promising increases in wages and benefits, increased job security, and improvements in their terms and conditions of employment if the employees withdraw from the Union; threatening its employees with the futility of continued support of the Union; threatening its employees with loss of jobs, discharge, or adverse changes in their terms and conditions of employment if they continued to support the Union; sponsoring the circulation of petitions among its employees to decertify the Union as their collective-bargaining representative; directing their employees to bypass their collective-bargaining representatives and bring contacts by the Union directly to the attention of management; failing to remit dues to the Union under the terms of the expired labor agreement; refusing to process grievances; and engaging in a course of conduct inconsistent with its obligations under the Act to bargain in good faith with the Union.

(i) Respondents Sewell-Allen Big Star, Inc., No. 189, and Sewell-Allen Big Star, Inc., No. 2, a single employer, shall further cease and desist from interrogating their employees concerning their union sympathies; soliciting their employees to withdraw from the Union or to sign a petition to decertify the Union; sponsoring the circulation of a petition to decertify the Union; promising their employees increases in wages, benefits, working hours, and improvements in their terms and conditions of employment if they sign the decertification petition or abandon the Union as their collective-bargaining representative; telling the employees that the Union will strike; issuing threats of store closure, and statements that it will not bargain with or sign a labor agreement with Union President Sheppard or with the Union; demoting or discharging their

employees in order to further its unlawful sponsorship of the petition to decertify the Union and discharging or demoting employees because the employees oppose the Respondents' unlawful conduct or to otherwise further its attempts to rid itself of the Union; refusing to process grievances; and from engaging in a course of conduct inconsistent with its obligations under the Act to bargain in good faith with the Union.

(j) Respondent Sewell's Big Star, Inc. No. 187, shall further cease and desist from refusing to accept or process grievances filed by the Union.

(k) The Respondents shall not in any like or related manner interfere with, restrain, or coerce their employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, meet and bargain with United Food and Commercial Workers International Union, AFL-CIO, Local No. 1529 concerning the terms and conditions of employment of the employees in the appropriate units.

(b) Furnish to the Union, on request, relevant information in order to enable it to bargain on behalf of its unit employees.

(c) Make the unit employees whole for any loss of wages or benefits, with interest, they may have incurred as a result of the withdrawal of recognition from the Union and refusal to bargain by Respondents and by reason of any unilateral changes instituted by Respondents in their terms and conditions of employment.

(d) Reinstate the existing terms of their expired

labor agreements until they have bargained in good faith with the Union and have reached new agreement(s) or valid impasse. Nothing here shall require the Respondents to rescind any increases or improvements in wages or benefits or new benefits previously granted.

(e) Respondent Baker Bros., Inc. shall make whole the Union for all loss of dues, with interest, suffered by reason of the Respondent's failure or refusal to remit dues following its withdrawal of recognition from the Union and, thereafter, remit dues in accordance with the terms of its expired labor agreements.

(f) Respondents Sewell's Big Star, Inc.; Sewell-Allen Big Star, Inc.; Sewell-Allen Big Star, Inc., No. 2; Baker Bros., Inc.; SMF Management, Inc.; and Gilbert Allen Big Star, Inc., d/b/a Big Star No. 142, shall process grievances in accordance with the terms of their expired labor agreements.

(g) Respondent Sewell-Allen, Inc., No. 2 shall offer Bill Gross, Theresa Heist, Becky Hordyk, James Kimbrough, and Johnnie Worrell immediate and full reinstatement to their former positions or, if those positions are no longer available, to substantially equivalent positions without prejudice to their seniority and other rights and privileges previously enjoyed, and make the employees whole for all loss of wages and benefits they incurred by reason of the Respondent's unlawful discrimination against them in the manner set forth in the remedy section of the decision and remove from its files all references to the discharges of Gross, Heist, Hordyk, and Kimbrough and to the demotion of Worrell.

(h) All Respondents shall preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay

due under the terms of this Order.

(i) Post at their facilities copies of the attached notices as designated for each Respondent marked "Appendices A through F."[14] Copies of the notices, on forms provided by the Regional Director for Region 26, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(j) Each Respondent shall notify the Regional Director in writing within 20 days from the date of this Order what steps each Respondent has taken to comply.

Dated, Washington, D.C. May 31, 1989

James M. Stephens, Chairman

Wilford W. Johansen, Member

Mary Miller Cracraft, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX A (attachment of APPENDIX B)

NOTICE TO EMPLOYEES

Posted By Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

The National Labor Relations Board has determined that our withdrawal of recognition from and refusal to bargain with United Food and Commercial Workers International Union, AFL—CIO, Local No. 1529 was unlawful.

WE WILL NOT withdraw recognition from the Union as the representative of our employees.

WE WILL NOT fail or refuse to meet and bargain with the Union regarding terms and conditions of employment of our employees in the following appropriate bargaining unit. The appropriate bargaining unit is:

All head meat cutters, journeymen meat cutters, apprentices and wrapper-clerks.

WE WILL NOT fail or refuse to abide by the terms of our expired labor agreement with the Union, until such time as an agreement is reached with the Union or an impasse is reached.

WE WILL NOT institute changes in the terms of the collective-bargaining agreement which expired on October 30, 1982, or in any other terms and conditions of employment of our employees without bargaining with the Union.

WE WILL NOT fail or refuse to furnish the Union with relevant information necessary for it to bargain on behalf of its members.

WE WILL NOT unilaterally grant to our employees increases in wages without duly notifying the Union and bargaining collectively in good faith concerning the proposed changes provided that nothing herein shall require us to rescind any increases in wages which we have previously granted.

WE WILL NOT refuse to process grievances in accordance with the terms of our expired labor agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, upon request, meet and bargain collectively with United Food and Commercial Workers, AFL—CIO, Local 1529 concerning the terms and conditions of employment of our employees in the unit described above.

WE WILL, on request, furnish the Union with relevant information to enable it to bargain on behalf of our employees.

WE WILL make whole, with interest, our employees for any losses they may have sustained by the implementation of any unilateral changes by us from the terms of the expired labor agreement.

WE WILL reinstate the terms of the expired labor agreement until we have negotiated in good faith with the Union and have either reached agreement or have reached an impasse in bargaining.

Our employees have the right to join and support United Food and Commercial Workers, AFL—CIO, Local 1529, as their collective-bargaining representative or to refrain from doing so.

SEWELL'S BIG STAR, INC.,
d/b/a BIG STAR NO. 187

.....

(Employer)

Dated: _____ By: _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1407 Union Avenue, Suite 800, P. O. Box 41559, Memphis, Tennessee 38174-1559, Telephone: 901-521-2687.

APPENDIX B (attachment of APPENDIX B)

NOTICE TO EMPLOYEES

Posted By Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

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To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

The National Labor Relations Board has determined that our withdrawal of recognition from and refusal to bargain with United Food and Commercial Workers International Union, AFL—CIO, Local No. 1529 was unlawful.

WE WILL NOT withdraw recognition from the Union as the representative of our employees.

WE WILL NOT fail or refuse to meet and bargain with the Union regarding terms and conditions of employment of our employees in the following appropriate bargaining unit. The appropriate bargaining unit is:

All head meat cutters, journeymen meat cutters, apprentices and wrapper-clerks.

WE WILL NOT fail or refuse to abide by the terms of our expired labor agreement with the Union, until such time as an agreement is reached with the Union or an impasse is reached.

WE WILL NOT institute changes in the terms of the collective-bargaining agreement which expired on October 30, 1982, or in any other terms and conditions of employment of our employees without bargaining with the Union.

WE WILL NOT fail or refuse to furnish the Union with relevant information necessary for it to bargain on behalf of its members.

WE WILL NOT unilaterally grant to our employees increases in wages without duly notifying the Union and bargaining collectively in good faith concerning the proposed changes provided that nothing herein shall require us to rescind any increases in wages that we have previously granted.

WE WILL NOT refuse to process grievances in accordance with the terms of our expired labor agreement.

WE WILL NOT interrograte our employees concerning their Union sympathies; sponsor the circulation of a petition among our employees to decertify the Union as their collective-bargaining representative; or solicit our employees to circulate or sign a petition with promises of increases in wages or benefits or improved working conditions, or threats of reprisals, discharge, layoff, strikes, or store closure or with the futility of continued representation by the Union or its representatives.

WE WILL NOT engage in conduct inconsistent with our obligation to bargain with the Union as the collective-bargaining representative of our employees.

WE WILL NOT in any like or related manner interfere

with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, upon request, meet and bargain collectively with United Food and Commercial Workers, AFL—CIO, Local No. 1529 concerning the terms and conditions of employment of our employees in the unit described above.

WE WILL, on request, furnish the Union with relevant information to enable it to bargain on behalf of our employees.

WE WILL make whole, with interest, our employees for any losses they may have sustained by the implementation of any unilateral changes by us from the terms of the expired labor agreement.

WE WILL reinstate the terms of the expired labor agreement until we have negotiated in good faith with the Union and have either reached agreement or have reached an impasse in bargaining.

Our employees have the right to join and support United Food and Commercial Workers, AFL—CIO, Local 1529, as their collective-bargaining representative or to refrain from doing so.

SEWELL'S BIG STAR, INC.,
d/b/a BIG STAR NO. 189

(Employer)

Dated: _____ By: _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1407 Union Avenue, Suite 800, P. O. Box 41559, Memphis, Tennessee 38174-1559, Telephone: 901-521-2687.

APPENDIX C (attachment of APPENDIX B)

NOTICE TO EMPLOYEES

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An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

The National Labor Relations Board has determined that our withdrawal of recognition from and refusal to bargain with United Food and Commercial Workers International Union, AFL—CIO, Local No. 1529 was unlawful.

WE WILL NOT withdraw recognition from the Union as the representative of our employees.

WE WILL NOT fail or refuse to meet and bargain with the Union regarding terms and conditions of employment of our employees in the following appropriate bargaining unit. The appropriate bargaining unit is:

All head meat cutters, journeymen meat cutters, apprentices and wrapper-clerks.

WE WILL NOT fail or refuse to abide by the terms of our expired labor agreement with the Union, until such time as an agreement is reached with the Union or an impasse is reached.

WE WILL NOT institute changes in the terms of the collective-bargaining agreement which expired on October 30, 1982, or in any other terms and conditions of employment of our employees without bargaining with the Union.

WE WILL NOT fail or refuse to furnish the Union with relevant information necessary for it to bargain on behalf of its members.

WE WILL NOT unilaterally grant to our employees increases in wages without duly notifying the Union and bargaining collectively in good faith concerning the proposed changes provided that nothing herein shall require us to rescind any increases in wages which we have previously granted.

WE WILL NOT refuse to process grievances in accordance with the terms of our expired labor agreement.

WE WILL NOT interrogate our employees concerning their Union sympathies; sponsor the circulation of a petition among our employees to decertify the Union as their collective-bargaining representative; or solicit our employees to circulate or sign a petition with promises of increases in wages or benefits or improved working conditions, or threats of reprisals, discharge, layoff, strikes, or store closure or with the futility of continued representation by the Union or its representatives.

WE WILL not discharge or demote our employees in order to promote their support of a petition to decertify the Union or encourage them to otherwise withdraw their support of the Union.

WE WILL NOT engage in conduct inconsistent with our obligations to bargain with the Union as the collective-bargaining representative of our employees.

WE WILL not in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, upon request, meet and bargain collectively with United Food and Commercial Workers, AFL—CIO, Local 1529 concerning the terms and conditions of employment of our employees in the unit described above.

WE WILL, on request, furnish the Union with relevant information to enable it to bargain on behalf of our employees.

WE WILL make whole, with interest, our employees for any losses they may have sustained by the implementation of any unilateral changes by us from the terms of the expired labor agreement.

WE WILL reinstate employees Bill Gross, Theresa Heist, Becky Hordyk, James Kimbrough, and Johnny Worrell to their former positions prior to our unlawful discrimination against them, or, if those positions are no longer available, to substantially equivalent positions, and WE WILL remove from their personal records all references to the discharges of Gross, Heist, Hordyk and Kimbrough, and the demotion of Worrell.

WE WILL make employees Bill Gross, Theresa Heist, Becky Hordyk, James Kimbrough, and Johnny Worrell, whole for the loss of wages and benefits, with interest, inclusing any loss of seniority they may have incurred as a result of our unlawful descrimination against them.

WE WILL reinstate the terms of the expired labor agree-

ment until we have negotiated in good faith with the Union and have either reached agreement or have reached an impasse in bargaining.

Our employees have the right to join and support United Food and Commercial Workers, AFL—CIO, Local 1529, as their collective-bargaining representative or to refrain from doing so.

SEWELL-ALLEN BIG STAR, INC., NO. 2,
d/b/a BIG STAR NO. 103

(Employer)

Dated: _____ By: _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1407 Union Avenue, Suite 800, P. O. Box 41559, Memphis, Tennessee 38174-1559, Telephone: 901-521-2687.

APPENDIX D (attachment of APPENDIX B)

NOTICE TO EMPLOYEES

Posted By Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

The National Labor Relations Board has determined that our withdrawal of recognition from and refusal to bargain with United Food and Commercial Workers International Union, AFL—CIO, Local No. 1529 was unlawful.

WE WILL NOT withdraw recognition from the Union as the representative of our employees.

WE WILL NOT fail or refuse to meet and bargain with the Union regarding terms and conditions of employment of our employees in the following appropriate bargaining unit. The appropriate bargaining unit is:

All head meat cutters, journeymen meat cutters, apprentices and wrapper-clerks.

WE WILL NOT fail or refuse to abide by the terms of our expired labor agreement with the Union, until such time as an agreement is reached with the Union or an impasse is reached.

WE WILL NOT institute changes in the terms of the collective-bargaining agreement that expired on October 30, 1982, or in any other terms and conditions of employment of our employees without bargaining with the Union.

WE WILL NOT fail or refuse to furnish the Union with relevant information necessary for it to bargain on behalf of its members.

WE WILL NOT unilaterally grant to our employees increases in wages without duly notifying the Union and bargaining collectively in good faith concerning the proposed changes provided that nothing herein shall require us to rescind any increases in wages that we have previously granted.

WE WILL NOT refuse to process grievances in accordance with the terms of our expired labor agreement.

WE WILL NOT fail or refuse to remit dues to the Union in accordance with the terms of our expired labor agreement.

WE WILL NOT engage in interrogation of our employees concerning their union sympathies, union membership, or attendance of union meetings; or sponsor or endorse the circulation of petitions to decertify the Union as the collective-bargaining representative of our employees; or solicit our employees to sign the petitions; or promise increases in wages or benefits or better working conditions or greater job security to our employees if they decertify or otherwise abandon their support for the Union; or issue threats of discharge, strikes, layoffs, less favorable working conditions, or hours if the employees continue to sup-

port the Union; or issue threats to out employees of the futility of their continued support for the Union because we will not sign a new labor agreement, or will not bargain with the Union or continue to abide by the terms of the expired labor agreement.

WE WILL NOT encourage our employees to bypass the collective-bargaining representative and to bring contacts by the Union to the attention of our management.

WE WILL NOT engage in conduct inconsistent with our obligation to bargain with the Union as the collective-bargaining representative of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, upon request, meet and bargain collectively with United Food and Commercial Workers, AFL—CIO, Local 1529 concerning the terms and conditions of employment of our employees in the unit described above.

WE WILL, on request, furnish the Union with relevant information to enable it to bargain on behalf of our employees.

WE WILL make whole, with interest, our employees for any losses they may have sustained by the implementation of any unilateral changes by us from the terms of the expired labor agreement.

WE WILL make whole the Union for any loss of dues, with interest, it may have incurred as a result of our failure and refusal to remit dues to it pursuant to the terms of the expired labor agreement.

WE WILL reinstate the terms of the expired labor agreement until we have negotiated in good faith with the Union and have either reached agreement or have reached an impasse in bargaining.

Our employees have the right to join and support United Food and Commercial Workers, AFL—CIO, Local 1529, as their collective-bargaining representative or to refrain from doing so.

BAKER BROS. INC., d/b/a
BAKER'S BIG STAR STORES
NOS. 31, 61, 64, AND 81

(Employer)

Dated: _____ By: _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1407 Union Avenue, Suite 800, P. O. Box 41559, Memphis, Tennessee 38174-1559, Telephone: 901-521-2687.

APPENDIX E (attachment of APPENDIX B)

NOTICE TO EMPLOYEES

Posted By Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

The National Labor Relations Board has determined that our withdrawal of recognition from and refusal to bargain with United Food and Commercial Workers International Union, AFL—CIO, Local No. 1529 was unlawful.

WE WILL NOT withdraw recognition from the Union as the representative of our employees.

WE WILL NOT fail or refuse to meet and bargain with the Union regarding terms and conditions of employment of our employees in the following appropriate bargaining unit. The appropriate bargaining unit is:

All head meat cutters, journeymen meat cutters, apprentices and wrappers.

WE WILL NOT fail or refuse to abide by the terms of our expired labor agreement with the Union, until such time as an agreement is reached with the Union or an impasse is reached.

WE WILL NOT institute changes in the terms of the collective-bargaining agreement which expired on October 30, 1982, or in any other terms and conditions of employment of our employees without bargaining with the Union.

WE WILL NOT fail or refuse to furnish the Union with relevant information necessary for it to bargain on behalf of its members.

WE WILL NOT unilaterally grant to our employees increases in wages without duly notifying the Union and bargaining collectively in good faith concerning the proposed changes provided that nothing herein shall require us to rescind any increases in wages that we have previously granted.

WE WILL NOT refuse to process grievances in accordance with the terms of our expired labor agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, upon request, meet and bargain collectively with United Food and Commercial Workers, AFL—CIO, Local 1529 concerning the terms and conditions of employment of our employees in the unit described above.

WE WILL, on request, furnish the Union with relevant information to enable it to bargain on behalf of our employees.

WE WILL make whole, with interest, our employees for any losses they may have sustained by the implementation of any unilateral changes by us from the terms of the expired labor agreement.

WE WILL reinstate the terms of the expired labor agreement until we have negotiated in good faith with the Union and have either reached an agreement or have reached an impasse in bargaining.

Our employees have the right to join and support United Food and Commercial Workers, AFL—CIO, Local 1529, as their collective-bargaining representative or to refrain from doing so.

SMF MANAGEMENT, INC., d/b/a
SMF FOOD RITE SUPERMARKETS

(Employer)

Dated: _____ By: _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1407 Union Avenue, Suite 800, P. O. Box 41559, Memphis, Tennessee 38174-1559, Telephone: 901-521-2687.

APPENDIX F (attachment of APPENDIX B)

NOTICE TO EMPLOYEES

Posted By Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

The National Labor Relations Board has determined that our withdrawal of recognition from and refusal to bargain with United Food and Commercial Workers International Union, AFL—CIO, Local No. 1529 was unlawful.

WE WILL NOT withdraw recognition from the Union as the representative of our employees.

WE WILL NOT fail or refuse to meet and bargain with the Union regarding terms and conditions of employment of our employees in the following appropriate bargaining unit. The appropriate bargaining unit is:

All head meat cutters, journeymen meat cutters, apprentices and wrapper-clerks.

WE WILL NOT fail or refuse to abide by the terms of our expired labor agreement with the Union, until such time as an agreement is reached with the Union or an impasse is reached.

WE WILL NOT institute changes in the terms of the collective bargaining-agreement that expired on October 30, 1982, or in any other terms and conditions of employment of our employees without bargaining with the Union.

WE WILL NOT fail or refuse to furnish the Union with relevant information necessary for it to bargain on behalf of its members.

WE WILL NOT unilaterally grant to our employees increases in wages without duly notifying the Union and bargaining collectively in good faith concerning the proposed changes provided that nothing herein shall require us to rescind any increases in wages which we have previously granted.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, upon request, meet and bargain collectively with United Food and Commercial Workers, AFL—CIO, Local 1529 concerning the terms and conditions of employment of our employees in the unit described above.

WE WILL, on request, furnish the Union with relevant information to enable it to bargain on behalf of our employees.

WE WILL make whole, with interest, our employees for any losses they may have sustained by the implementation of any unilateral changes by us from the terms of the expired labor agreement.

WE WILL reinstate the terms of the expired labor agreement until we have negotiated in good faith with the Union and have either reached an agreement or have reached an impasse in bargaining.

Our employees have the right to join and support United Food and Commercial Workers, AFL-CIO, Local 1529, as their collective-bargaining representative or to refrain from doing so.

GILBERT ALLEN BIG STAR, INC.,
d/b/a BIG STAR NO. 142

(Employer)

Dated: _____ By: _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1407 Union Avenue, Suite 800, P. O. Box 41559, Memphis, Tennessee 38174-1559, Telephone: 901-521-2687.

APPENDIX C

NOS. 89-5730/5868

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED AUG 23 1991
LEONARD GREEN, Clerk

SEWELL-ALLEN BIG STAR, INC.; BAKER BROS., INC., d/b/a BAKER'S BIG STAR STORES NOS. 31, 61, 64 AND 8I; GILBERT ALLEN BIG STAR, INC., d/b/a BIG STAR NO. 142; SEWELL-ALLEN BIG STAR, INC., NOS. 103, 187, AND 189; SMF MANAGEMENT, INC., d/b/a SMF FOOD RITE SUPERMARKETS,	
Petitioners, Cross-Respondents,	ON PETITION FOR REVIEW AND CROSS-PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD
V.	
NATIONAL LABOR RELATIONS BOARD,	
Respondent, Cross-Petitioner,	
UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1529, AFL-CIO,	
Intervenor.	

A-230

Decided and Filed _____

Before: **MILBURN** and **NELSON**, Circuit Judges, and **ENGEL**, Senior Circuit Judge.

DAVID A. NELSON, Circuit Judge. The National Labor Relations Board found that each of the petitioners in this case committed an unfair labor practice by refusing to recognize a local union following the expiration of collective bargaining agreements with the local. The Board rejected an argument that the local did not have to be recognized because it had merged with another union some seven months before the collective bargaining agreements expired. The Board also found that one petitioner had waged an anti-union campaign by discharging and demoting employees for union activities and soliciting employees to sign a decertification petition, and that another petitioner had sponsored a decertification petition through "supervisors" who were in fact members of the bargaining unit. The petitioners seek review of the Board's order, and the Board cross-petitions for enforcement. We shall deny the petition for review and grant the Board's cross-petition for enforcement.

I

The petitioners (or "the companies") independently operate retail grocery stores in the Memphis, Tennessee, area. Prior to January of 1982 the companies' meat department employees were represented by Local 452 of the United Food and Commercial Workers International Union (UFCW). Each unit was covered by a collective bargaining agreement that was scheduled to expire on October 30, 1982.

A.

Local 452 was originally part of the Amalgamated Meat Cutters and Butcher Workers of North America. In

1979 Amalgamated merged with the Retail Clerks International Union to form the UFCW. This merger did not directly affect Local 452. In January of 1982, however, the executive board of Local 452 agreed to merge the local into UFCW Local 1529, formerly a local union of the Retail Clerks International Union. The merger was voted on at bargaining unit meetings held in February. The members of Local 452 approved the merger by a vote of 432 to 72. The UFCW likewise approved the merger, and it became effective on April 1, 1982. All assets of Local 452 were transferred to Local 1529. The president of Local 452, Mike Mancini, became secretary-treasurer of Local 1529; the secretary-treasurer and chief executive officer of Local 452, Bill Lambert, became a consultant to Local 1529. Mancini and several other Local 452 officials moved their offices to those of Local 1529.

On April 7, 1982, Mancini, as "Secretary-Treasurer U.F.C.W. Local 452," sent letters to the companies informing them of the merger. Attached to Mancini's letter was another letter, signed by officials of each local, stating that "with the approval of the memberships, [the locals] have effected a merger" effective April 1, 1982, that the merged unions would operate as Local 1529; and that "the merger in no way affects the autonomy of the Local Union and, in any event, is purely an internal matter having no affect [sic] on the relationship between Local No. 452 and [the company]."

The labor agreements between the union and the companies continued to be administered in the usual way following the merger. Grievances were accepted and processed, union dues were deducted and sent to Local 1529, contributions were made to health and pension funds, and representatives of Sewell-Allen and Baker Brothers met with the union in June to negotiate an increase in health and welfare premiums. As early as May 28 and 31, the attorneys for Baker Brothers and Sewell-Allen acknowledged their understanding that "Local 452 has been merged into

Local 1529."

None of the companies challenged the merger until after the contracts had expired. During a bargaining session with Local 1529 Dan Allen, president and co-owner of Sewell-Allen, asked if nonmembers had voted on the merger (they had not), but neither he nor anyone else connected with the companies took any action before the contract expired.

On September 8 Sewell-Allen Big Star Store 189, acting through its attorney, expressed a willingness to initiate bargaining with Local 1529 at a mutually agreeable time. On November 8, 1982, however, the companies notified the union that they no longer recognized it as their employees' bargaining representative. The stated reason was that nonmember employees had not been allowed to vote on the merger.[1] The companies unilaterally granted wage increases thereafter. SMF, Sewell-Allen, and Baker Borthers refused to process grievances, and Baker Brothers refused to remit to the union dues that had been deducted from employees' pay.

B

On June 28 the meat department supervisor of Sewell-Allen's Big Star Store 103, Clifford Phillips, told an employee, Johnnie Worrell, that Sewell-Allen wanted the employees to get out of the union because of the merger. He added that working conditions would be better without the union. On June 30 store manager Michael Gordon spoke to Worrell about withdrawing from the union. Gordon suggested that the union might force the store to close. On

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[1] The Supreme Court has since found it permissible to exclude nonmember employees. *NLRB v. Financial Institution Employees of America, Local 1182 (Seattle-First National Bank)*, 475 U.S. 192 (1986). In proceedings before the Board's administrative law judge the companies also claimed that other procedural defects, such as the lack of a secret ballot, invalidated the vote.

July 12 company co-owners Lex Sewell and Dan Allen made similar representations to Worrell. In early August Sewell and Allen told several other employees that benefits would be better without the union. When one employee, James Kimbrough, asked what would happen if he stayed in the union, either Sewell or Allen replied that his family would be out on the street and he would be out of a job. In November of 1982 Sewell, Allen, and Gordon saw Kimbrough passing out literature soliciting union membership. Kimbrough was discharged the following January, at which time Gordon told him that there was too much help in the meat department.

Phillips offered Leroy Dancer, a part-time meatcutter, more hours if he would circulate a decertification petition. On August 25 Gordon gave Dancer a petition stating "[w]e want out of the Union" and told him how to file it with the NLRB. Gordon also told him, several times, "[n]ow, remember, this is your idea." When Dancer expressed doubt that the company could win a decertification election, Gordon showed Dancer the new work schedule and said: "It is even, even now. These people are no longer with us." Gordon named three workers (Heist, Hordyk, and Gross) who had been discharged the previous week.

Sewell-Allen demoted Phillips from supervisor to head meatcutter, also on August 25, and moved Johnnie Worrell from head meatcutter to Journeyman meatcutter, As head meatcutter, Phillips was a member of the bargaining unit and could therefore sign the decertification petition. On August 27 Phillips summoned each employee on duty into his office to see Dancer, who asked each to sign the petition. Dancer filed the petition with the Board later that day.

The company claims that the discharges of Heist, Hordyk, Gross, and Kimbrough were economically justified. Although the sales volume of Sewell-Allen's meat department remained steady, Sewell-Allen claims that

fewer full-time employees could handle the same workload more efficiently than many part-timers. Also, the workload decreased because in July the store began buying boxed rather than hanging beef; in August it began ordering pre-packaged chickens; and in October it began buying boneless chucks, all of which reduced the amount of meat cutting necessary. Sewell and Allen testified that they were unaware of any union activity by Heist and Hordyk before they were discharged. Sewell and Allen claim that Gross was discharged because he only worked eight hours a week and could not work the night shift where, pursuant to a union grievance, they needed more staffing. As for Kimbrough, they claim that he was discharged not because of pro-union activities but becaue he was the least senior employee at the time. They assert that after the discharges the store was able to maintain the same dollar sales volume with 90 fewer hours per week and no increase in overtime.

C

In July and August of 1982 Mike Hamm, head meatcutter at Baker Brothers Store No. 61, asked several employees to sign a petition to decertify the union. He told other employees that Baker Brothers would not sign a new contract with the union, and he promised better working conditions without the union. At roughly the same time Todd McClellan, head meatcutter at Baker Brothers Store 81, asked three employees to sign a decertification petition. He told two employees that they would make more money without the union, and he warned another that Baker Brothers would not negotiate with the union. In early August John Westmoreland, a "roving" head meatcutter, questioned an employee, Charles Mayfield, about the union and told him that his hours would be cut or he would lose his job if he voted for the union. Hamm, McClellan, and Westmoreland were bargaining unit employees.

Three weeks after Westmoreland questioned Mayfield, Alvin Baker, president and co-owner of Baker

Brothers, approached Mayfield at work. He told Mayfield that Westmoreland had told him that Mayfield had been harassed by someone from the union. Baker told Mayfield to let him or Westmoreland know if it happened again.

After the decertification petition was filed on August 9, Baker met with the meat department employees at each of his stores. He told them that he understood an overwhelming majority of employees had signed the petition and that he appreciated those people who had. He also promised that the company would run "smoother" after they got rid of these "interruptions." Baker says he told the employees that they would not lose pay or benefits regardless of the results of the election.

D

Accepting a recommendation and opinion of the administrative law judge, the Board found that all four companies had violated §§ 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (5), by withdrawing recognition from and refusing to bargain with Local 1529. The Board agreed with the ALJ that the six-month statute of limitations barred any defense based on procedureal defects in the merger vote, and it agreed that the companies were estopped from asserting such a defense because they had treated Local 1529 as the employees' representative after the merger. The Board also found that Sewell-Allen and Baker Brothers committed independent violations of §§ 8(a)(1) and (5) of the Act by sponsoring decertification petitions and encouraging employees to get out of the union. The Board rejected Baker Brothers' argument that it was not responsible for the statements of its head meatcutters. The Board also found that Sewell-Allen's discharges violated §§ 8(a)(1) and (3).

II

A

Section 10(b) of the National Labor Relations Act, 29

U.S.C. § 160(b), prohibits the filing of an unfair labor practice charge with respect to events occurring more than six months before the filing. This six-month limitation period applies as well to defenses based on unfair labor practices. *NLRB v. Marin Operating Inc.*, 822 F.2d 890, 893 (9th Cir. 1987). Section 10(b) also bars a charge based on an unfair labor practice occurring within the six-month period if adjudication of the charge would require determining whether events outside the limitations period also violated the Act. *Local Lodge No. 1424, Int'l Ass'n of Machinists v. NLRB (Bryan Mfg. Co.)*, 362 U.S. 411, 416 (1960). A company cannot defend its refusal to recognize a union based on an allegedly invalid merger if the merger occurred outside the § 10(b) limitations period and the employer continued to recognize the union. *Joe Costa Trucking Co.*, 238 N.L.R.B. 1516, 1517, 1521-22 (1979), *enf'd sub nom. NLRB v. Edjo, Inc.*, 631 F.2d 604 (9th Cir. 1980). See also *North Bros. Ford, Inc.*, 220 N.L.R.B. 1021 (1975) (company could not challenge union's status as lawful successor to the previous union because company had recognized the union more than six months earlier). We see no reason not to follow these decisions here.

Although an employer is not usually free during the term of a collective bargaining agreement to withdraw recognition from the union with which it negotiated by agreement, *Abbey Medical/Abbey Rents, Inc.*, 264 N.L.R.B. 969 (1982), *enf'd*, 709 F.2d 1514 (9th Cir. 1983), recognition may be withdrawn if the union becomes defunct or a schism occurs. *Yates Industries, Inc.*, 264 N.L.R.B. 1237, 1249 (1982). A merger of two local affiliates of the same international union does not automatically relieve the employer of the obligation to bargain with the successor union, but deficiencies in the voting process could affect a company's obligation. *Id.* at 1249. The Board observed in the present case that the companies would have been "entirely within their rights" to refuse to deal with the union had they determined that Local 1529 was not a successor pursuant to a valid merger. But the com-

panies concede that they received prompt notice of the merger and did not question it. We agree with the Board that the notice of merger was unambiguous.

B

We also accept the Board's conclusion that the companies are estopped from challenging the merger because they continued to deal normally with the new local until the contracts expired. In June of 1982 Sewell-Allen and Baker Brothers bargained with Local 1529 over an increase in insurance payments. Although SMF and Gilbert Allen did not engage in such brgaining, none of the petitoners questioned Local 1529's status when Leon Sheppard, chief executive officer of Local 1529, wrote to each in July concerning bargaining for a new contract. SMF and Gilbert Allen provided some of the information Sheppard requested, and Sewell-Allen Big Star Store 189 expressed willingness to begin negotiations. All of the petitioners also continued to remit dues in the usual manner.

Citing *Knapp-Sherril Co.*, 263 N.L.R.B. 396 (1982), the Board found that by this conduct the companies recognized Local 1529, and that such recognition barred them from subsequently challenging the validity of the merger. In *Knapp* the Board held that the employer waived its right to challenge the procedures employed in a merger between two locals where it had notice of the merger, where it treated the new local as its employees' bargaining representative, and where the union relied on the employer's apparent acquiescence in the merger by taking no steps to reestablish its majority status. In the case at bar, as in *Knapp*, the companies were informed of the merger very shortly after it became effective, and they treated the merged entity as their employees' bargaining representative. Local 1529 took no action to reestablish its majority status during the term of the contract. Now that the contract has expired, however, the companies have "disrupted the bargaining relationship at a time when [the

local's] role as bargaining representative is most vital to the employees: at the commencement of negotiations for a new collective-bargaining agreement." *Id.* at 398. As in *Knapp*, the companies "had but to question initially the merger procedures rather than recognize Local [1529]." *Id.* The companies are estopped from questioning the merger procedure now.

NLRB v. Canton Sign Co., 457 F.2d 832 (6th Cir. 1972), is not to the contrary. In that case the predecessor union was never certified as the bargaining representative of the company's employees, and no union members worked for the company when it withdrew recognition. *Id.* at 839, see also *Knapp*, 263N.L.R.B. at 398 n.5.

III

The Board determined that Sewell-Allen violated the Act by waging an anti-union campaign. The Board's findings of fact must be accepted if they are supported by substantial evidence in the record taken as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

It is an unfair labor practice for an employer to threaten retaliation or to promise benefits based on employees' support for or opposition to the union. *NLRB v. E.I.DuPont de Nemours*, 750 F.2d 524, 527-28 (6th Cir. 1984). Kimbrough testified that Sewell and Allen threatened that he would be out of a job if he supported the union. Dancer testified that store manager Gordon and supervisor Phillips had him circulate a decertification petiton and promised him more hours for completing the task. It is an unfair labor practice for an employer to sponsor or participate in the circulation of a decertification petition. *Indiana Cal-Pro, Inc. v. NLRB*, 863 F.2d 1292, 1299 (6th Cir. 1988). Dancer testified that he was given the petition, that he was told whose names should appear first and last, and that Gordon provided him with the address of the local NLRB office. The evidence also indicates that Sewell,

Allen, Gordon, and Phillips repeatedly solicited employees to withdraw support from the union, which they ought not to have done. See *Turnbull Cone Baking Co. v. NLRB*, 778 F.2d 292, 296 (6th Cir. 1985), *cert. denied*, 476 U.S. 1159 (1986).

Substantial evidence also supports the Board's finding that Sewell-Allen violated §§ 8(a)(1) and (3) by discharging workers because of union activity. Such conduct clearly violates the Act. *NLRB v. Price's Pic-Pac Supermarkets, Inc.*, 707 F.2d 236, 240 (6th Cir. 1983). Unlawful motivation may be inferred from demonstrated hostility to the union, the timing of the discharges, and the implausibility of proffered reasons for them. *DuPont*, 750 F.2d at 529; *Grand Rapids Die Casting Corp. v. NLRB*, 831 F.2d 112, 117 (6th Cir. 1987). Hostility to the union can be seen in the decertification drive. The timing of the discharges, just before the decertification petition was filed, is suspicious. As for the proffered reason for the discharges, Sewell-Allen contends that it had only operated Store 103 for a short time and that it was still making adjustments. It notes that the discharges of Heist, Hordyk, and Gross occurred at the end of the fiscal year, and it cites changes in the form in which it purchased meat, which reduced the amount of meatcutting necessary. However, the Board showed that several discharges did not reduce the hours worked but merely shifted hours between employees. The evidence also showed that sales per hours worked actually decreased slightly after Heist, Hordyk, and Gross were released. There is also direct evidence of anti-union motive. Gordon boasted to Dancer that after the discharges of Heist, Hordyk, and Gross, the numbers of employees in favor of and opposed to the union were equal. The company gives no explanation for the timing of Kimbrough's discharge, except that it became apparent to them that he was no longer needed. This explanation is suspect, given that he was told several months earlier that if he supported the union he would be out on the street in January or February.

IV

Whether Baker Brothers conducted an anti-union campaign is not quite as clearcut. Only statements and conduct attributable to the employer may constitute an unfair labor practice. *NLRB v. Schroeder,* 729 F.2d 967, 970 (3d Cir. 1984). The Board's finding that Baker Brothers had violated § 8(a)(1) was based for the most part not on the conduct of upper management,[2] as in the case of Sewell-Allen, but on the conduct of Baker Brothers' head meatcutters, who were members of the bargaining unit. The issue here is whether the activities of Baker Brothers' head meatcutters in interrogating employees and sponsoring a decertification drive are attributable to Baker Brothers.

We must first determine whether the head meatcutters were supervisors. The National Labor Relations Act defines a supervisor as:

> "[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U.S.C. § 152(11).

Because the definition is written in the disjunctive, an employee is a supervisor if he performs any of the listed activities, as long as the authority requires independent judgment. *NLRB v. Lauren Mfg. Co.,* 712 F.2d 245, 247 (6th Cir. 1983). The courts have also recognized secondary indicia

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[2] Baker Brothers does not seriously challenge the Board's finding of an independent violation of § 8(a)(1) based on Al Baker's interrogation of employee Mayfield, and substantial evidence supports the finding.

of supervisor status, such as co-workers' perceptions that the person is a supervisor or the small amount of time devoted to the type of work performed by bargaining unit employees. *Monotech of Mississippi v. NLRB*, 876 F.2d 514, 517 (5th Cir. 1989). Each of the three meatcutters in question meets some of these criteria. Hamm directed the work of others, interviewed applicants and effectively recommended that they be hired. He disciplined employees, he was considered by co-workers as the manager of the meat department, and he spent only a quarter of his time cutting meat. McClellan directed the work of others, assigned and approved overtime and vacations, and was considered the manager of the department by his co-workers. Westmoreland was able to discipline co-workers. The Board's determination that the head meatcutters are supervisors thus has support in the record and a reasonable basis in law. *See Beverly Enterprises v. NLRB*, 661 F.2d 1095, 1099 (6th Cir. 1981).

Nevertheless, the conduct of the supervisors may be attributed to the employer only if "the employer encouraged, authorized, or ratified the supervisor's activities or acted in such manner as to lead employees reasonably to believe that the supervisor was acting for or on behalf of management." *Montgomery Ward & Co.*, 115 N.L.R.B. 645, 647 (1956), *enf'd*, 242 F.2d 497 (2d Cir.), *cert. denied*, 355 U.S. 829 (1957). Accord, *Connecticut Distributors, Inc. v. NLRB*, 681 F.2d 127, 129 (2d Cir. 1982). See also *Schroeder*, 726 F.2d at 971 (noting that the majority of courts of appeals addressing the issue "have predicated the employer's liability for threats by a supervisor on whether the employee hearing them would have just cause to believe that the supervisor was acting for and on behalf of the employer"); *Ballou Brick Co. v. NLRB*, 798 F.2d 339, 347 (8th Cir. 1986).

Al Baker, by his comments to employees at each of his stores after the decertification petition was filed, ratified the head meatcutters' activities. he placed his

imprimatur on the decertification drive by thanking those who signed the petition "for the confidence" they placed in him. His statement that things would run more smoothly after the matter was resolved could be taken, as the Board took it, as an implied promise of better conditions without the union despite Baker's assurance that the employees would not lose benefits regardless of the vote. Baker's questioning of one employee regarding union "harassment," based on reports he received from McClellan, also supports the inference that McClellan and the others acted with Baker's approval. Baker also admitted telling the employees that he understood an overwelming majority of employees had signed the petition. Baker learned this from McClellan. McClellan, not surprisingly, attended the meeting at Store 81, where he was head meatcutter. McClellan's anti-union activities and the content of Baker's remarks suggest that McClellan acted with the approval of management.

V

After this case was submitted, the petitioners filed a motion for leave to file a supplemental brief, pursuant to Rule 28(c), Fed. R. Ap. P., in order to discuss three recent appellate cases: *Texas Petrochemicals v. NLRB*, 923 F.2d 398 (5th Cir. 1991); *NLRB v. Mountain Country Food Store, Inc.*, 931 F.2d 21 (8th Cir. 1991); and *Emhart Industries, Hartford Division v. NLRB*, 907 F.2d 372 (2d Cir. 1990). These authorities do not alter our conclusion that the petitioners' defense of an invalid merger is barred and that the petitioners committed unfair labor practices.

Accordingly, the motion for leave to file a supplemental brief is **DENIED**, the employers' joint petition for review of the Board's order is **DENIED**, and the Board's cross-petition for enforcement of its order is **GRANTED**.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
NOV 1 1991
LEONARD GREEN, Clerk

SEWELL-ALLEN BIG STAR, INC., ET AL.,	)	
Petitioners/Cross-Respondents,	)	
v.	)	ORDER
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent/ Cross-Petitioner,	)	
UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1529, AFL-CIO, (UFCW, LOCAL 1529),	)	
Intervenor	)	

BEFORE: MILBURN and NELSON, Circuit Judges; and ENGEL, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk